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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 241

MOTORS INSURANCE CORPORATION, A CORPORATION, THE AVONDALE MOTOR CAR COMPANY, A CORPORATION, FRED KAHN, AND JOHN L. CASHMAN, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED,

Appellants,

vs.

WALTER A. ROBINSON, AS SUPERINTENDENT OF INSURANCE OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF OHIO

No. 32938

MOTORS INSURANCE CORPORATION, A CORPORATION, THE AVONDALE MOTOR CAR COMPANY, A CORPORATION, FRED KAHN, AND JOHN L. CASHMAN, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, AS SUPERINTENDENT OF INSURANCE OF OHIO AND ROBERT L. MOULTON, AS DIRECTOR OF COMMERCE OF OHIO,

Defendants-Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees in the above entitled cause, for their statement in opposition to appellants' statement as to jurisdiction herein and in support of appellees' motion to dismiss or affirm, respectfully state the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is the claim of the appellants, a New York corporation, and some 1100 of its agents, that certain Ohio statutes providing that an insurance agent may not "principally" use his license to insure property of which he is (among other capacities and relationships) the "owner" or "vendor," as interpreted and applied by the Superintendent of Insurance of the State

of Ohio and as construed by the Ohio courts, are contrary to and in violation of the Due Process and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Ohio trial and intermediate appellate courts sustained appellees' demurrer to the petition, and the Supreme Court of Ohio, the court of last resort, denied an appeal on the grounds that no debatable constitutional question, nor any question of public or great general interest was involved. The court further denied a rehearing on the matter.

The statutory provisions in issue are as follows:

Section 644, General Code.

"No person shall procure, receive, or forward applications for insurance unless a resident of this state and duly licensed by the superintendent of insurance. Upon written notice by an insurance company authorized to transact business in this state of its appointment of a person to act as its agent the superintendent of insurance, if he is satisfied that the appointee is a suitable person and intends to hold himself out in good faith as an agent; that appointee is honest, trustworthy and understands the duties and obligations of an agent and is familiar with the insurance laws of the state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; that in applying for such license it is not appointee's purpose or intention principally to solicit or place insurance on appointee's own property or that of relatives, employers or employees or that for which they or the appointee is agent, custodian, vendor, bailee, trustee or payee, shall issue to appointee a license which shall state in substance that the company is authorized to do business in this state and that the person named therein is a constituted agent of the company in this state for the transaction of such business as it is authorized to transact therein. Such appointee, if he has not theretofore held a license as an insurance agent in this state, shall be required to

submit to a hearing and examination as to the above qualifications. Such notice by an insurance company of its appointment of an agent shall be upon a form furnished by the superintendent of insurance and shall be accompanied by a statement under oath by the appointee which shall give appointee's name, age, residence, present occupation, occupation for the five years next preceding the date of the notice and such other information, if any, as the superintendent of insurance may require, upon a blank furnished by him. Such examination and/or hearing shall be held and decision rendered by the superintendent of insurance within thirty days from date of application for license. The Superintendent of insurance, after the granting of such license, for cause shown, and after a hearing, may determine any persons so appointed, or any person heretofore appointed as agent to be unsuitable to act as such agent, and shall thereupon revoke such license and notify both the company and the agent of such revocation. Unless revoked by the superintendent of insurance or unless cancelled by him on written notice from the company or the agent that the agent's authority to act for the company has been terminated by the company, such license and any other license issued to an agent or any renewal thereof shall expire on the 30th day of June next after its issue. But any license issued and in force when this act takes effect or thereafter issued, may, in the discretion of the superintendent, be renewed for a succeeding year or years by a renewal certificate without the superintendent's requiring the detailed information required by this act. A foreign or alien insurance company shall pay a fee of two dollars for every such license and for each renewal thereof.

"The action of the superintendent of insurance in granting, revoking, renewing or refusing to grant, revoke or renew such license shall be subject to review in accordance with the provisions of the administrative procedure act (G.C. §§154-61 to 154-73).

"An insurance company shall be bound by the acts of the person named in the license within his apparent authority as its agent.

"This section shall not apply to life insurance companies, including fraternals nor to domestic mutual protective assessment fire associations as defined in section 9593 of the General Code nor affect the provisions of section 644-2 thereof."

Section 644-3, General Code.

"It shall be the duty of the superintendent of insurance to refuse to grant any license applied for, to refuse to renew, and to revoke any license of or to any appointee, agent, solicitor or foreign broker, when he is satisfied that the principal use of such license has been or is to procure, receive or forward applications for insurance of any kind, other than life, or to solicit, place or effect such insurance directly or indirectly upon or in connection with the property of such appointee, agent, foreign broker or solicitor or that of relatives, employers, employees, or that for which they or the appointee, agent, foreign broker or solicitor are or is agent, custodian, vendor, bailee, trustee or payee, or to evade or violate the provisions of section 9589-1 of the General Code.

"It also shall be the duty of the superintendent of insurance when a written complaint is filed with him that any such appointee, agent, foreign broker or solicitor has been, is or will be using any license or renewal thereof directly or indirectly for the purpose or purposes above set forth, to investigate such complaint forthwith. Provided, however, that in the event the superintendent of insurance finds there is no probable cause for complaint, he may order the complaint dismissed. Such action of the superintendent of insurance shall be subject to review by appeal to the court of common pleas of Franklin County, Ohio, provided such appeal shall be filed by the complainant with the superintendent of insurance and the court within thirty days after such action by the superintendent. Said cause shall proceed as a new civil action with the right of either party to submit evidence and to appeal.

"Unless the complaint has been dismissed as afore-

said, immediately upon completion of such investigation, the superintendent of insurance shall fix a time and place at which such complaint will be heard and shall give notice thereof to the complainant and to the appointee, agent, foreign broker or solicitor complained of. The date set for such hearing shall be within thirty days, but not earlier than fifteen days after the date of such notice. The complainant shall be a party, and any other person as defined by section 154-62 of the General Code upon application to the superintendent of insurance and for good cause shown may be made a party to such hearing. At such hearing, any party shall have the right to produce and examine witnesses and to participate in the investigation and hearing with all rights of a party under the provisions of the administrative procedure act including the right of appeal from any order entered therein to the common pleas court of Franklin County."

The Ohio courts found that appellants' agents, their employees or employers were "vendors" within the meaning of these statutes, and that the "principal use" of their licenses is as stated and admitted in paragraph 17(b) of the appellants' petition filed in the trial court, namely, "all but relatively few of the policies of insurance placed by said licensed agents * * * were on motor vehicles which had been sold by them or their employees or their employers."

Thus the issue reduces itself to a determination of whether the legislature through such statutes has reasonably exercised the police power of the State in regulating the activities of the State's licensed insurance agents.

II. The Facts

Motors Insurance Corporation, a member of General Motors Corporation family, entered Ohio with its auto dealer agency system, nominating some 1100 persons connected with motor vehicle dealership of General Motors

cars, for insurance agents' licenses. Hearings were held before the Superintendent of Insurance to determine the suitability of such persons to be licensed as insurance agents. At these hearings these applicants testified under oath that they did not intend principally to use their licenses to write insurance on property which they owned or for which they or their employers or employees were owners or vendors, as set out in Section 644, General Code. They had also previously so stated in their applications for licenses filed with the Department of Insurance.

Being satisfied as to their intent to abide by the Ohio law as set forth in Sections 644 and 644-3, General Code, on what is generally known as "controlled insurance business," the Superintendent of Insurance issued licenses to those nominated by Motors Insurance Corporation, cautioning them that their production records would be checked to ascertain whether they were complying with the principal use provision of the insurance law (Sec. 644 G.C.).

A year later affidavits of these same agents, in answer to questions by the Superintendent of Insurance, showed that substantially all of the business written by these agents was upon automobiles which were owned or sold by them, or their employees or employer. Paragraph 17(h) of the appellants' petition admits this fact. The superintendent then gave notice under the Ohio Administrative Procedure Act which brought the renewal of these licenses in question inasmuch as these agents had apparently violated the provisions of Sections 644 and 644-3, General Code.

Thereupon the plaintiffs-appellants filed suit in the State trial court to enjoin the superintendent from refusing to grant licenses to such agents, from refusing to admit such persons to examination, from refusing to renew such licenses, and from revoking such licenses.

As stated before, to this petition the defendants-appellees filed a demurrer which was sustained.

III. No Substantial Federal Question Is Presented by This Appeal

Appellants' authorities do not seem to oppose, but rather to admit:

(1) That the field of insurance, including the licensing of agents, is vested with a public interest and is highly regulated under the police power of the State.

La Tourette v. *McMaster*, 248 U. S. 465, 467, 63 L. Ed. 362, 39 S. C. 160.

Verducci v. *Casualty Company*, 96 Ohio St. 260.

Robbins v. *Hennessey, et al.*, 86 Ohio St. 181.

State, ex rel. Federal Union Ins. Co. v. *Warner*, 128 Ohio St. 261.

State, ex rel. Allstate Ins. Co. v. *Bowen*, 130 Ohio St. 347.

(2) That there, also, is a presumption that the legislature understands the needs of its people and that its legislation is based on adequate grounds.

Middletown v. *Texas Light & Power Co.*, 249 U. S. 152, 157, 63 L. Ed. 527, 39 S. C. 227.

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-8, 75 L. Ed. 324, 51 S. C. 130.

City of Xenia v. *Schmidt*, 101 Ohio St. 437, 450.

Thus, it would appear that unless plaintiffs-appellants can show affirmatively that there is no basis for the statutory provisions in question, the acts of the legislature will have withstood their challenge.

A

The prohibition against using an insurance agent's license principally to solicit or place controlled business is a reasonable exercise of the police power and is directed

against certain evils in the insurance field, and is a satisfactory standard for determining the good faith of an insurance agent.

Pre-eminent among these evils was the situation which existed during the automobile shortage when the purchaser was at the mercy of the dealer, and was required to take the automobile loaded with unwanted accesories, including insurance coverage when the dealer had a licensed agent available. Plaintiffs-appellants admit (see paragraph 17(h) of their petition) that the principal use of their licenses has been to place insurance upon motor vehicles which they have sold, as in fact it was almost 100%.

Such legislation need not work a perfect cure. See:

Central Lumber Co. v. *South Dakota*, 226 U. S. 157, 160, 57 L. Ed. 164, 33 S. C. 66.

Hughes v. *Superior Court of California*, 339 U. S. 460, 94 L. Ed. 985.

Another evil at which the principal use test is directed is to prevent or hinder monopolistic control over any particular type of insurance coverage. The best example of this is the case at hand. The *figures presented in plaintiffs-appellants' petition filed in the trial court* show that approximately 1100 licensed insurance agents working out of approximately 450 General Motors dealerships, and placing only limited coverage on motor vehicles in the first full year of operation (1949), wrote business totalling $4,681,-846.94 in net premium volume, and exceeded only by the Farm Bureau Mutual Auto Insurance Company, which company has been in business in Ohio approximately 25 years and that in 1950 the net premium of Motors Insurance Company jumped to $6,226,391.01.

Another reason for the principal use test is found in Section 644, which has prescribed since its enactment that the applicant "intends to hold himself out in good faith as

an agent." The principal use which an agent makes of his license is one of the tests which the legislature has laid down to determine whether or not a person is an agent in "good faith."

B

There are abundant precedents for the exercise of the police power in the manner indicated by Sections 644 and 644-3 of the Ohio Code found in the laws and rulings of other States, none of which has been declared unconstitutional.

New York law pertaining to the licensing of insurance brokers authorizes the Superintendent of Insurance to refuse to issue or to renew a license, "if he finds that more than ten per cent of the aggregate net commissions received during the term of the existing license, if any, or to be received during the term of the license applied for, by the applicant, resulted or will result from insurance on property and risks * * * (of certain specified sources) * * *." McKinney's Consolidated Laws of New York Annotated, Book 27, *Insurance,* Section 119, paragraph 4.

New Jersey statutes provide as a condition to issuance of an agent's, broker's or solicitor's license:

> "* * * that the applicant
>
> * * *
>
> "(b) is actually engaged in the general insurance business, or a particular group or groups thereof with the general public, and * * *
>
> * * *
>
> "(g) he is then engaged in or intends to engage in the business of writing or negotiating insurance as his principal business or occupation or as a substantial part thereof, separate and apart from any connection which he may have with any partnership or corporation whose principal business is lending money, and

"(h) is not seeking such license principally for the purposes of negotiating or writing insurance on property owned by him, or in which he has an insurable interest, or on property or insurable interests of a relative or his employer, * * *."

New Jersey Statutes, Annot. Perm. Ed., Title 17, Chap. 22, Section 6.9.

In Chapter 17, Section 6.16 of the same volume of New Jersey Statutes, the grounds for revocation of an insurance license include where:

"(d), for any license year, the premium writings of the respondent, represented by the premiums or contracts of insurance obtained, countersigned or issued by him for the general public does not exceed those on contracts of insurance obtained, countersigned or issued by him covering his own property or insurable interests or that of his relatives and his employers, * * *"

Massachusetts law, which follows New York closely, requires the Insurance Commissioner to refuse to issue or to renew any license,

"* * * if he finds that more than ten per centum of the aggregate net commissions received * * * (by a licensee) * * * during the term of any prior license or renewal, or which would probably be received during the term of a new license, resulted or would result from insurance in or in respect to the property or any interest therein of any of the following. * * *"

Annotated Laws of Massachusetts, Vol. 5A, part I, chap. 175, Sec. 174C.

In Tennessee, the licensing law provides as follows:

"Sec. 6236-6. It shall be the duty of the commissioner of insurance and banking to withhold any license applied for, or revoke any license to any agent, solicitor or broker when he is satisfied that the principal use of such

> license is to effect insurance upon the property of such agent, broker or solicitor, or to evade or violate the provisions of section 6133 of the Code of Tennessee." Williams Tenn. Code Annot., Vol. 4.

The following account of official Rulings of the Tennessee Division of Insurance is reported in *Odle* v. *McCormack*, 185 Tenn. 439, 206 S.W. 2d, 416, 421:

> "In the Insurance Report of 1943, there appears an official ruling that 'Every agent must write at least four times as much business for the general public as he writes controlled business. Controlled business means business written for yourself, your employers, your business associates or affiliates, and all relatives nearer than cousins.' We find that Official Ruling No. 16 is to the same effect but much broader in scope in that controlled business includes the following who may be related to the insurance agent as 'agent, custodian, *vendor*, bailee, trustee or payee.' "

Under Texas law, no person may receive an insurance license unless he

> "• • • is, or intends to be actively engaged in the soliciting or writing of insurance from the public generally; • • • "

Also, a licensee is prohibited from engaging "in the insurance business principally to handle business which he controls only through ownership, mortgage or sale, family relationship or employment. • • •" Vernon's Annot. Texas Civil Statutes, Vol. 14, Art. 21.14, Sec. 5.

The preceding is not presented as an exhaustive study of the laws of other jurisdictions, but simply to indicate that many other states have enacted legislation which requires an insurance agent (1) to write no more than a maximum percentage of business on specified risks and (2) to be actively engaged in the insurance business with the general public.

C

The statutes as construed and applied do not violate the due process clause or equal protection principle of the Fourteenth Amendment.

The statutes are not limited in scope to automobile dealers. They cover all persons whether they be automobile dealers, real estate men, or others. They *apply* to all persons alike. There are no exceptions or qualifications in the laws. Nor do the laws restrict the right of any individual to enter into the insurance business. They simply require that those who desire to be insurance agents do not use their licenses principally to write controlled business.

The statutes do not prevent licensing of part-time insurance agents, no distinction or discrimination is made between full-time and part-time agents, between those who write general insurance,—that is, various lines—or those who write special lines, as do the appellants. The principal use test falls on all alike.

The Superintendent of Insurance in applying "the production record test," a mathematical test, did not act arbitrarily. Reference to the appellants' petition, as stated before, discloses that the business written by the agents was practically 100% controlled as shown after one year's experience.

The construction and application of the statutes in question do not destroy the insurance business of agents engaged in selling automobiles, but simply make such agents, along with all others, subject to the principal use test, and require the Motors Insurance Corporation and its agents to conform their way of doing business to the laws of Ohio. See *State, ex rel. Allstate Ins. Co.* v. *Bowen*, 130 Ohio St., 347.

That there is no debatable constitutional question involved in the present case, and any claim of such is frivolous, is made clear by pronouncements of this court in upholding

the acts of state legislatures attacked upon the grounds advanced here.

Because of its amazing similarity to the case at hand, the decision in *Daniel* v. *Family Security Life Ins. Co., et al.*, 336 U. S., 220, 787 S.C. Acts of 1948, p. 1947, 93 L. Ed., 632, 69 S. C. 550, will be considered and compared in detail.

Supreme Court Case	*This Case*
1. A South Carolina statute provides that life insurance companies and their agents may not operate an undertaking business, and undertakers may not serve as agents for life insurance companies (criminal sanctions are provided).	1. The complaint here is that certain "classes" are being deprived of their "right" to be insurance agents. (It would appear that the South Carolina is the stricter since it operates absolutely against a class.)
2. The moving party complained that it was the only concern affected by the law, and that its manner of doing business was being attacked unconstitutionally.	2. MIC insures only against risk of physical damage to and theft of motor vehicles, and operates only through General Motors dealerships, thus placing itself in a position vulnerable to the principal use test.
3. Complaint was made that the "insurance lobby" obtained the statute from the South Carolina legislature.	3. The same complaint has been suggested here.
4. It was argued there was no evil to be corrected by the legislation.	4. Same here.

This court's answer to each of the above points which was delivered in an unanimous opinion, is most persuasive.

In answer to the second point enumerated, this court said in a footnote following the opinion:

> "That respondent company is the only concern now affected by the statute does not, of course, mean a denial of equal protection. The statute is drawn in general terms; the company's success might well induce others to enter the business. See the dissenting opinion below, 79 F. Supp. at 73, 74. And see Mason v. Missouri, 179 U. S. 328."

The third point this court dismissed with the brief statement appearing at page 224, as follows:

> "It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality. • • • (citing cases) • • •"

The last point received a little more attention, but was dismissed with the following observation, at pp. 224, 225:

> "Despite evidence to the contrary, respondents see no evil to be corrected by this legislation. We are asked to agree with respondents and call the statute arbitrary and unreasonable.
>
> "Looking through the form of this plea to its essential basis, we cannot fail to recognize it as an argument for invalidity because this court disagrees with the desirability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature.
>
> "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can

we say that the statute has no relation to the elimination of those evils. There our inquiry must stop.

"This rationale did not find expression in *Liggett Co.* v. *Baldridge*, 278 U. S. 105, on which respondents rely. According to the majority in Liggett, 'a state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." ' 278 U. S. at 113. But a pronounced shift of emphasis since the Liggett case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend. See *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, where the cases are reviewed.

"Our deference to the legislative judgment is particularly pronounced in a field as traditionally well regulated as insurance. See *Osborn* v. *Ozlin*, 310 U. S. 53, 65, 66; *La Tourette* v. *McMaster*, 248 U. S. 465, 467, 468; *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 416, n. 13."

A note found in 93 L. Ed., page 637, following the report of the above case reads as follows:

"The decision in *Daniel* v. *Family Security L. Ins. Co.* (1949) 336 US 220, 93 L. ed. 632 illustrates the unanimous view of the Supreme Court, announced in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.* (1949) 335 US 525, 542, 557, 93 L. ed. 212, 225, 227, 69 S. Ct. 251, 260, 267, 6 ALR 2d 473, that the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the pubic welfare, the Court returning closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific Federal constitutional prohibition, or of some valid Federal law."

And in *American Federation of Labor* v. *American Sash & Door Co.*, 335 U. S. 538, 93 L. Ed. 222, in upholding the validity of state laws forbidding agreements to employ only union members, Justice Black had this to say:

> "• • • and concerning state laws we have said that the existence of evils against which the law should afford protection and the relative need of different groups for that protection 'is a matter for the legislative judgment.' *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 378, 81 L. Ed. 703, 713; 57 S. Ct. 578; 108 A. L. R. 1330. We cannot say that the Arizona amendment has denied appellants equal protection of the laws."

See also *Hall, Supt. of Banks* v. *Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480, 37 S. C. 217, and *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 93 L. Ed. 533, 69 S. C. 463.

See also *Cohen* v. *Beneficial Loan Corp.*, 337 U. S., 541, 551, 93 L. Ed. 1528, 69 S. Ct. 1221. (The courts do not judge nor remark upon the wisdom and policy of a statute; legislation cannot be set aside because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it); *Osborn* v. *Ozlin*, 310 U. S. 53, 84 L. Ed. 1074, 60 S. C. 758 (upholding a Virginia statute providing that insurance contracts on Virginia property and persons could be effected only by licensed resident agents and that such agent may not share more than half of his commissions with a non-resident broker); *St. John* v. *New York*, 201 U. S. 633, 50 L. Ed. 896, 26 S. C. 554 (upheld discrimination in New York statute between producing and non-producing vendors of milk).

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Supreme Court of Ohio be affirmed.

Respectfully submitted,

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